IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-565

JOHN H. BAILEY, *Petitioner*

v.

STATE OF DELAWARE, *Respondent*

REPLY BRIEF FOR PETITIONER

On Writ of Certiorari to the Supreme Court of the State of Delaware.

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STATEMENT OF THE CASE

The Petitioner, John H. Bailey, incorporates by reference the entire statement of the case as presented in the petition for writ of certiorari to the Supreme Court of the State of Delaware.

A review of the statement of the case as contained in the State's brief in opposition to the petition reveals distortions of fact on each and every page. For example, it is completely inaccurate to state that there were no incidents involving the jury's exposure to matters not in evidence.[1] The fact is that the jury was exposed on a continuous basis from all forms of news media to prejudicial statements each and every day of the trial, and, in fact, during the trial, leaflets were handed out in front of the courthouse—one of which was made a part of the record and is fully set forth at page 4 of the petition. Moreover, the jury was exposed to seeing the presence of the trial judge eating dinner at the same table as the chief investigating officers.[2]

The Delaware Supreme Court cautioned against this behavior.[3]

While the State suggests that five eyewitnesses testified seeing John Bailey shoot Sheila Ferrell, the State fails to mention that four of the five were children whose testimony was highly discredited during the trial. In fact, one of those children told an adult one or two days after the alleged shooting that he knew nothing about it. Also, it wasn't until the week before the trial was to start that the State made known that it had five eyewitnesses. All along, the State had confirmed through the Deputy Attorney General handling this case and the chief investigating officer that there was one eyewitness.

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1. State's brief—2.
2. See petition—7.
3. A.10.

It is further a gross distortion to say that the petitioner told police after his arrest that he had a gun at the scene of the shooting. The fact is that after the police officers cornered him with guns drawn and while the defendant was in fear of his life, did he tell them that he threw the gun in the river which the officers knew was impossible because of the distance involved.[4] It is significant that, just prior to this time, he had received extremely rough treatment by the police, double handcuffed, thrown down on the floor in a room where there were no windows with guns drawn and was afraid of being killed. It was also uncontradicted that members of the same police department killed a man under similar circumstances and that the defendant was aware of that fact. Moreover, dozens of police officers had surrounded the house where the petitioner was before they entered.

To say that there was no contact or communication between the trial judge, officers and the jury, is out of line with reality. The State does not contest the fact that officers who ate dinner with the trial judge, in full view of the jury were key prosecution witnesses. In fact, the State does not attempt to contradict any of the facts outlined at pages 4 and 5 of the petition with respect to this issue.

Nor does the State rebut the fact that the prosecution attempted to represent that a pattern was present so far as the petitioner's failure to make appropriate responses prior to and immediately after arrest.[5]

It is true that the petitioner had a door handle in his hand after leaving his vehicle just prior to the time that Sheila Ferrell was shot. The fact is, which was uncontradicted at trial, that the door handle to the vehicle had not been affixed to the door, and the defendant had to pick it up off the floor of the car to open the car door with, and

4. State's brief—3.

5. Petition—6, 7; State's brief—4, 5.

that was the sole reason that he had it in his hand at the time.

It is important to point out that while driving to 35th and West Streets, the petitioner was with his wife and two young children, one of which was an infant.

Moreover, not only did the physical evidence present demonstrate affirmatively the defendant's innocence, Dr. Spritz confirmed this scientifically, and there was an independent eyewitness who also confirmed it.

ARGUMENT

A. The Presence of the Trial Judge Eating Dinner at the Same Table as the Chief Investigating Officers Who Sat at the Attorney General's Table Throughout the Trial and Were Key State Witnesses, During Deliberations, 15-20 Feet From the Jury, Coupled with the Fact That These Officers Guarded and Protected the Jury After the Case Was Over but Before the Verdict, Deprived the Petitioner of Due Process.

The petitioner, John H. Bailey, incorporates by reference the argument as contained at pages 7-9 in the petition.

As stated earlier, to say that there was no communication between the trial judge, the officers and the jury is out of touch with reality.[6] Obviously, communicate means to convey, impart or connect as well as the sharing of knowledge between individuals. It is respectfully submitted that the communication and contact as described in the petition at pages 7-9 was so prejudicial that it destroyed the credibility of all defense witnesses and enhanced the credibility of the State witnesses.

The Delaware Supreme Court stated:

> "The appearances of propriety are often as important as propriety itself." (A.10)

The court went on to warn the police not to conduct themselves in such a manner as occurred in this case, but the court would not reverse. The petitioner respectfully submits that the Delaware Supreme Court was in error in refusing to reverse the lower court's denial of the defendant's motion for a new trial on the charges of manslaughter and possession of a deadly weapon during the commission of a felony and in refusing to find that such conduct denied the defendant's right to a fair trial.

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6. State's brief—6.

B. The Use for Impeachment Purposes of Petitioner's Silence During Arrest and After Receiving Miranda Warnings, Violated Due Process.

The petitioner incorporates by reference argument B as contained at pages 9 and 10 of the petition.

Once again, the State distorts the facts by suggesting that the defendant admitted virtually every aspect of the case: by failing to indicate that the car door handle was in his hand, because it was necessary to take it off the floor of the car to open the door to begin with; and by suggesting that the defendant told the police that he had disposed of the gun which he had at the scene of the shooting by throwing it into the river; and in failing to point out the tremendous pressure and fear which the defendant felt. Even one of the officers who was holding a gun admitted that he was shaken up at the time.

The State's argument relies upon the hope that the jury would understand the reason that the prosecutor's prejudicial comments were being offered without explaining to the jury the purpose for which it was being offered and in what manner it should not be considered.

The petitioner submits that this Court has already dealt with the type of argument which the State offers in *Doyle v. Ohio*, — U.S. —, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

The petitioner submits that the logical assumption which the jury would draw is that since the petitioner, prior to trial, did not make his position known, everything he said at trial which was not mentioned to the police prior to trial, must be a lie. The State then compounds this prejudice by attempting to use the lack of reaction shown by the petitioner through questioning of his wife, as implying that the petitioner must be guilty. Moreover, this was further prejudiced by the prosecutor's comments on cross-examination as to what the petitioner did not say at the time of arrest.

Accordingly, the statements by the prosecutor were comments upon the defendant's right to remain silent.

C. The Petitioner's Presumption of Innocence was Destroyed Because of the Publicity Before Trial, During the Trial, the Failure of the Court to Change Venue, Sequester the Jurors, the Association of the Chief Investigating Officers Guarding and Protecting the Jury After the Case Was Over but Before the Verdict and Their Association with the Court at Dinner in the Presence of the Jury During Deliberations.

The petitioner incorporates by reference section C as contained at pages 11 and 12 of the petition.

The defendant at trial relied heavily upon physical evidence which supported him, the testimony of an independent eyewitness and that of Dr. Spitz, as well as his own testimony to demonstrate to the jury that he was, in fact, innocent. While the initial charges in the indictment were murder first-degree, the jury did convict the defendant of manslaughter along with the weapons violation.

The petitioner was convicted only because of the tremendous pressure exerted by the community on the jury which stemmed from constant threats, rioting and demonstrations, coupled with the failure of the court to change venue, sequester the jurors, the association of the chief investigating officers guarding and protecting the jury after the case was over but before the verdict, and their association with the court at dinner in the presence of the jury during deliberations.

Surely, it is the sum of everything that takes place in a trial that convicts a man. Here, there are so many problems of a prejudicial nature prior to, during, and after the trial was over, that it was, in fact, impossible for the defendant to get a fair trial.

The State does not rebut the fact that the physical evidence in the record tremendously supported the defendant's plea of innocence. The fact is that the State's case was won before the trial started and was reinforced in spite of the strong defense because of the prejudice

which occurred during the trial and afterward during deliberations.

The petitioner, John H. Bailey, submits to this Court that his presumption of innocence was destroyed.

CONCLUSION

For all of the foregoing reasons, this petitioner submits that a writ of certiorari should be granted.

Respectfully submitted,
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